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No.

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In the Supreme Court of the United States

October Term, 1981

CITIES SERVICE GAS COMPANY,
CITIES SERVICE CRYOGENICS, INC. and
CITIES SERVICE HELEX, *Petitioners,*

vs.

MOBIL OIL CORPORATION, et al., and RALPH GROUNDS, et al., *Respondents,*

and

UNITED STATES OF AMERICA,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1) *Whether the Court of Appeals for the Tenth Circuit Violated Due Process by:*

a) *Applying As the Law of the Case a Decision in Another Case to Which Petitioners Were Not Parties nor Represented?*

b) *Abating a Case After Submission Without Notice or Hearing?*

c) *Terminating Without Explanation an En Banc Court Four and One-Half Years After Submission and Reassigning the Case to a Panel?*

d) *Applying Inconsistent Rulings on the Same Subject Matter?*

e) *Construing a Contract for the Benefit of Third Parties When Such Was Not in Issue in the Trial Court or Evidence Produced Thereon?*

2) *Whether the Ruling That the Value of Helium Be Determined Exclusively by the Work-Back Method Conflicts With the Broad Rule of Admissibility of Evidence in Federal Courts in Value Cases?*

3) *Whether the Application of Federal Common Law Is Appropriate to Impose Liability Against Private Parties and Against the United States?*

4) *Whether the Provisions of the Natural Gas Act of 1938 and the Helium Act Amendments of 1960 Can Be Reconciled Without Abrogating the Price Provision of the Gas Purchase Contracts and Setting Aside Releases and Binding Arbitration Pertaining to Payment for Helium?*

LIST OF PARTIES

Petitioners Cities Service Gas Company, Cities Service Cryogenics, Inc. and Cities Service Helex[1] were original plaintiffs and a part of the Helex Group.[2]

Respondents consist of two groups:

(a) Lessee-producers group as representatives of a class who entered into gas purchase contracts with natural gas pipeline companies;[3]

(b) The Landowners group as representatives of a class who entered into oil and gas leases with the Lessee-producers.[4]

The United States intervened as a party plaintiff.

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1. All are subsidiaries of Cities Service Company.

2. Panhandle Eastern Pipe Line Company; National Helium Corporation; Northern Natural Gas Company; Northern Helex Corporation; Northern Natural Gas Products Company; Cities Service Gas Company; Cities Service Helex, Inc.; Cities Service Cryogenics, Inc.

3. Cabot Corporation; Helmerich & Payne, Inc.; Texaco, Inc.; Ashland Oil & Refining Company; Dorchester Gas Producing Company; Mobil Oil Corporation; Cities Service Oil Company (now Cities Service Company); Gulf Oil Corporation; Pan American Petroleum Corporation (now Amoco); Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company; Phillips Petroleum Company; Amoco Production Company; Atlantic Richfield Company.

4. Such parties are listed in Appendix p. A660.

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OPINIONS BELOW

The United States District Court for the District of Kansas rendered its decision on November 12, 1974, which is reported at 393 F.Supp. 949. The opinion of the court of appeals for the tenth circuit affirming in part and reversing in part is reported at 666 F.2d 1279. The original district court decision is reported at 292 F.Supp. 619, affirmed in part and reversed in part at 411 F.2d 704. Certiorari was denied at 92 S.Ct. 732, 404 U.S. 1063, 30 L.Ed.2d 751 with Justices Blackmun and Stewart voting to grant certiorari, and Justice Powell taking no part in such decision.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1981. A timely petition for rehearing with suggestion for rehearing en banc was filed on November 30, 1981. Such petition was denied on January 19, 1982. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of . . . property, without due process of law . . ." (Appendix p. A539)

This case also involves Section 11 of Helium Act Amendments of 1960, 74 Stat. 922, 50 U.S.C. 167i (Appendix p. A550); and Section 1(b) and 4(c) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717(b) and 717c. (Appendix pp. A539-A540)

STATEMENT OF THE CASE

These class actions were filed in the United States District Court for the District of Kansas in 1963 as actions in interpleader and in the nature of interpleader. Jurisdiction was invoked pursuant to 28 U.S.C. 1335 and 2361. An interlocutory order by the district court sustaining jurisdiction was affirmed per curiam by the court of appeals for the tenth circuit in 1964 and reported at 327 F.2d 1003.

In 1960, Congress passed the Helium Act Amendments (74 Stat. 918, 50 U.S.C. §167-167n) which authorized the Secretary of the Interior to enter into long-term contracts for the acquisition and conservation of helium which comprised about 0.43 percent of the natural gas found in the Hugoton Gas fields located in Kansas, Oklahoma and Texas. The Secretary entered into four such contracts with affiliates of Northern Natural Gas Company, Cities Service Gas Company, Panhandle Eastern (National Helium owned jointly by Panhandle and National Distillers) and with Phillips Petroleum Company.

Petitioner, Cities Service Helex's contract with the United States for sale of crude helium[5] was entered into on the 22nd day of August, 1961, and provided for a price of approximately $12.00 per Mcf for the crude helium with some slight escalations. (292 F.Supp. 619, 657) Immediately after the execution of such contract, petitioner commenced constructing a helium extraction plant in Kansas.

As the helium program was getting underway, suits were filed in several courts by landowners claiming ownership of the helium constituent. Such suits were based on the premise that helium was a separate element, a non-hydrocarbon, and allegedly was not covered or included in the usual oil and gas lease. To avoid multiplicity of actions, petitioners and two other helium extraction companies, Northern Helex and National Helium, in 1963, filed these interpleader class actions in the United States District Court for the District of Kansas. The parties basically consist of three classes:

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5. Refined helium is approximately 99.9% pure helium. Crude helium is approximately 70% helium, 30% nitrogen. Contained helium is approximately 0.43% helium in the natural gas stream.

1) The Helex Group consisting of the interstate natural gas pipeline companies and their affiliated helium extraction companies;

2) The lessee-producers who entered into gas sales contracts with the interstate pipeline companies; and

3) The landowners who executed oil and gas leases to the lessee-producers.

The United States intervened as a party because of an indemnification agreement contained in the crude helium purchase contracts with the Helex Companies. In substance, the United States agreed to pay any sums exceeding 27% (approximately $3.00 per Mcf) of the unit price that the Helex Company might be required to pay third parties for the acquisition of the helium in the natural gas.

After a protracted trial, the district court of Kansas concluded the leases covered all constituents of the gas stream including helium, absent an express reservation. (292 F.Supp. 619, 669) (Appendix pp. A262-A263) The trial court likewise concluded that the gas purchase contracts covered the entire gas stream including nonhydrocarbon constituents. (*Id.*, 686) (Appendix p. A298)

On appeal, the court of appeals affirmed these findings of the trial court but held that because of the interaction of the Natural Gas Act and of the Helium Act Amendments of 1960, the price provisions in the gas purchase contracts had somehow been frustrated as a matter of law resulting in a void whereby the helium constituent had not been paid for under such gas purchase contracts. The case was remanded to the trial court to determine the reasonable value of the helium. (441 F.2d 704) (Appendix p. A133)

Section 11 of the Helium Act Amendments of 1960 provided that the provisions of the Natural Gas Act of 1938 should not be applicable to the sale of helium and in determining rates of a natural gas company there should be excluded both income and costs allocated to helium on a volumetric basis. Because of this provision, it was contended that since the gas purchase contracts were filed as FPC rates which in some instances were higher, some lower and some the same as the contract prices, such contracts could not control as to the value of the helium constituent. As to this contention the Kansas trial court had held that Section 11 was not intended to relieve lessee-producers selling helium bearing gas from their contracts simply because of a subsequently created market for a constituent of the gas stream. The Kansas court held Section 11 of the Helium Act Amendments did not require that helium be separately contracted for but it permitted the parties to do so but when they had not the contracts must stand as they were written. (292 F.Supp. 619, 680) (Appendix p. A285)

In reversing the trial court's holding the court of appeals held that notwithstanding the prices in the gas purchase contracts may have been nearly identical with or less or more than the permitted FPC rate, and notwithstanding releases or binding arbitration determining helium values between the producers and pipeline purchasers, the Helex Companies must pay not only the amounts theretofore paid under the gas purchase contracts but an additional sum representing the reasonable value of the helium content. The Court of Appeals stated:

> "In our opinion private contract law and the principles applicable thereto are not controlling." (441 F.2d 704, 722) (Appendix p. A166)

Three of the four helium extracting companies were parties to the Kansas interpleader suits. The fourth helex company, Phillips Petroleum Company, was not a party. One of its producers, Ashland Oil and Refining Company, brought suit against Phillips in Texas to recover the value of helium, which suit was removed to Oklahoma where it was tried in the summer of 1973. This suit (*Ashland*) only involved 18 wells producing helium bearing gas and 72,000 Mcfs of helium which was less than one-half of one percent of the 20,000,000 to 36,000,000 Mcfs of helium involved in the interpleader cases. (*Grounds*)

In a relatively short trial and with the evidence presented to it therein, the Oklahoma district court in *Ashland* adopted a novel "work-back" theory, sometimes referred to as proceeds less expenses theory, to determine value. In essence, such theory begins with a starting point or value from which is subtracted the costs of extracting of the helium from the natural gas. Included in such costs is an allowance of a rate of return on investment to be fixed by the court.

The Oklahoma trial court in its application of the work-back method, rather than starting from the price Phillips was receiving from the United States for the crude helium ($10.30 initially), started the work-back from the value of refined helium at $20.00 per Mcf. The resulting values found by the trial court for Ashland's helium ranged from a low of $12.07 per Mcf to a high of $16.98 per Mcf, somewhat higher than the United States was paying Phillips for its crude helium. (364 F.Supp. 6, 10) (Appendix p. A477)

In March, 1974, these interpleader cases (*Grounds I*) went to trial on the remand to the district court of Kansas to determine the reasonable value of the contained helium. In a greatly expanded trial setting, the producer class and

landowner class presented values per the work-back theory similar to that presented and adopted in Oklahoma (*Ashland*). The Helex Group and United States, with whom they were allied, presented considerable evidence that such theory was not a viable method to determine value in our economy but simply a method of dividing proceeds. In addition, sales of helium made in the United States both before and during the time period involved was presented for the court's consideration. Sales to government and privately operated helium plants during the time period were compared to sales made to the Helex Group. Opinion evidence was offered as to value based upon a supply-and-demand analysis and also upon a cost-of-production analysis similar to that used by the producers in proceedings before the FPC.

The Kansas trial court handed down its decision on November 12, 1974. (393 F.Supp. 949) (Appendix p. A28) It concluded that the work-back presented by the producers and landowners was erroneous because the first market of helium was not Grade A selling between $19.00 to $35.00 per Mcf; and the contracts between the Helex Companies and the United States contained a fixed amount for payment of the crude helium. Such contracts were not left "open-ended" so as to permit unlimited escalation.

The trial court further found that:

> ". . . there were markets for the commingled helium as it passed from the wellhead to the pipeline companies, and from pipeline companies to the government, private, and conservation helium extracting plants." (393 F.Supp. 949, 982) (Appendix p. A100)

Under the market approach the trial court found the value of helium ranging between $.60 per Mcf for 1961 to $.70 per Mcf for 1972. (393 F.Supp. 949, 984) (Appendix p.

A105) While the evidence before the trial court revealed that during the time period prices in intrastate gas contracts were virtually the same as in interstate gas contracts and, therefore, FPC regulation had little effect on gas prices, the trial court was constrained from considering the gas purchase contracts in arriving at value because of the mandate from the court of appeals in the original appeal.

The decision of the Kansas district court of November 12, 1974, was immediately appealed to the tenth circuit. Shortly thereafter a panel of the court of appeals on January 27, 1975, handed down its decision affirming the Oklahoma district court's finding of value. (*Ashland*) (Appendix p. A561) However, two members of that panel granted a petition for rehearing. The court then, acting en banc, withdrew the opinion filed in the Oklahoma court (*Ashland*) and vacated the judgment and granted a rehearing en banc. At the same time, the court acting en banc granted a hearing en banc on the appeal of the Kansas interpleader cases and consolidated such en banc hearing with the *Ashland* en banc hearing. (Order dated February 5, 1976, Appendix p. A340)

The consolidated hearings of the two appeals were heard by the en banc court on November 17, 1976. On May 10, 1977, the court of appeals rendered its decision in the Oklahoma *Ashland I* appeal but the Kansas appeal (*Helex II*) "is not considered in this opinion." (554 F.2d 381, 384) (Appendix p. A438) The court stated that the market evidence presented to the Oklahoma trial court was "too remote in time and place, and otherwise could not be considered as comparable." (554 F.2d 381, 386) (Appendix p. A441) One sale to a private helium extractor (not parties in either *Ashland* or *Helex II*) was dismissed as "not negotiated" and must be considered as a "post-litigation contract." (554 F.2d 381, 387) (Appendix pp. A442-A443)

The court of appeals proceeded to endorse the work-back method as the exclusive method of determining value. Certain aspects of this method adopted by the trial court were reviewed and found supported by the evidence and other aspects were found wanting. On remand the Oklahoma trial court was directed to reconsider the $20.00 figure used as the starting place as such had not been met by defendant by way of proof. The trial court was also directed to reconsider the allowance for the return on investment plus one other cost item, together with other matters "not foreclosed herein, that bear on the determination of value by the work-back method." (554 F.2d 381, 392) (Appendix p. A456)

While the Oklahoma trial court had awarded prejudgment interest based on the theory that the United States had condemned or seized the helium, the court of appeals affirmed this holding of prejudgment interest because:

> "As a matter apart from jurisdiction, we hold that the trial court's application of federal law was proper." (554 F.2d 381, 390) (Appendix p. A449)

The court noted that the United States was the "real party in interest" because under its indemnity agreement it is liable for some of the additional amounts which Phillips will have to pay. The court held that under *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), the application of state law under *Erie Railroad Co. v. Tompkins* was inapplicable. The trial court therefore

> ". . . acted within its discretion under federal law in the allowance of prejudgment interest." (554 F.2d 381, 392) (Appendix p. A454)

Circuit Judge Doyle dissented from the majority opinion stating that the work-back is not the preferred way

to determine value, but the preferred method was comparable sales plus expert testimony and alluded to the then submitted but undecided *Helex II* cases. He noted that there the Kansas trial court utilized comparable sales and opinion evidence and came up with a far different value, i.e. $.60 to $.70 per Mcf. He noted the superior record:

> "In sum, the government presented a real case in this instance - a much stronger case than was brought forth in *Ashland*. . . . The trial record is superior in the *Helex* cases. . . . If this present *Ashland* ruling becomes a precedent for the upcoming *Helex II* cases, the result could be a disaster to the government. . . (554 F.2d 381, 397) (Appendix pp. A465-A466)
>
> . . .
>
> I submit that the *Helex II* cases ought to have been the precedent and the model rather than the *Ashland* cases." (554 F.2d 381, 391-392) (Appendix p. A467)

The *Helex II* cases remained undecided in the court of appeals and *Ashland* went to trial on the remand and was decided by the district court of Oklahoma on December 29, 1978. (463 F.Supp. 619) (Appendix p. A390) The Oklahoma trial court concluded that the one fact which clearly emerged at retrial was the incorrectness of using refined helium value as the starting point, but that the crude helium contract price was the appropriate starting place in the work-back because the parties intended the base contract price to be the full and complete price.

The Oklahoma court on retrial noted that strict adherence to the work-back formula for the period 1963-1971 produced values ranging between a minus $.40 per Mcf and $5.34 per Mcf. (463 F.Supp. 619, 635) (Appendix p.

A427) The trial court concluded the reasonable value of helium should be based on "proper application of work-back methodology, the structure and salient economic factors of the various helium markets during the period in question. . . ."(463 F.Supp. 619, 627) (Appendix p. A408) and in its conclusions of law concluded that the reasonable value of the helium should be the sum that would have resulted from fair negotiations between an owner willing to sell and a purchaser desiring to buy. Based upon the evidence presented the court found the reasonable value of the commingled helium should be $3.00 per Mcf for each and every year that the helium was produced.

While this same trial court had awarded prejudgment interest in the first trial based upon a condemnation theory, in this trial it concluded that the amounts involved were not liquidated and, as a consequence, Ashland was not entitled to prejudgment interest.

The Oklahoma trial court's decision on retrial was appealed to the court of appeals where a panel in a per curiam opinion affirmed that the contract price was a proper starting point and that the rate of return utilized was satisfactory. The court held, however, that since it had previously approved the award of prejudgment interest, such became the law of the case and the decision was therefore reversed as to allowance of prejudgment interest and otherwise affirmed. (607 F.2d 335) (Appendix p. A385)

This case, *Helex II*, remained undecided four and one-half years before the en banc court. On May 11, 1981, all of the active judges of the circuit court, excepting Judge Holloway, issued an order as follows:

> "1. *Consolidated Helium Cases II* are removed from abated status. The en banc status of these cases is

terminated. The cases will be submitted to a three-judge panel for disposition." (Appendix p. A331)

It was only upon the issuance of this order that the petitioners or any of the other parties had been notified that this case had been "abated." On May 26, 1981, the Helex Group filed a petition addressed to each of the judges of the court who participated in the May 11th order requesting rescission of that order and to reinstate an en banc tribunal. (Appendix p. A554) This petition was never acted upon.

On November 16, 1981, the panel handed down its decision from which petitioners are seeking this writ of certiorari. In this opinion, the court noted its en banc decision in *Ashland* which resulted:

> ". . . in a remand directly and exclusively to the Oklahoma district court. . . . The Kansas appeal was held in abatement. The practical consideration for use of the abatement procedure was to employ only one district court initially for a redetermination of the helium valuation pursuant to the specific guidelines, directions and instructions contained in *Ashland I*. It was believed that further Oklahoma district court proceedings would serve to resolve the valuation issue in the related cases." 666 F.2d 1279, 1280-81) (Appendix p. A4)

The panel in *Helex II* held that the Kansas trial court erred in rejecting the work-back method; that the producers and landowners are entitled to a floor of $2.00 per Mcf and that prejudgment interest awarded by the trial court should be affirmed. The court concluded:

> "The 'work-back' method became the law of the case as a result of our *en banc* opinion in *Ashland I*." (666 F.2d 1279, 1284) (Appendix p. A13)

As to the background with respect to the $2.00 floor, in the original Kansas trial (1968) the trial court in its opinion discussed the evidence the government employed in negotiating the crude helium contracts on the basis of costs comparable to those it would incur in a government plant. One such allowance the government used was $2.00 for helium contained in the natural gas although as the court pointed out such $2.00 does not appear anywhere in the contract. While on appeal of that decision (*Grounds I*) the court of appeals made reference to such cost build-up, it was not until thirteen years later in this appeal did the court conclude that the $2.00 was intended for the use and benefit of the landowners and lessee-producers as the minimum of their entitlement. (666 F.2d 1279, 1289) (Appendix p. A18) This issue had not been presented to or considered by the trial court.

The court further concluded that, as it had in *Ashland*, applying the *Clearfield* doctrine under federal law, prejudgment interest was awardable to the lessee-producers and landowners.

The unusual procedures employed in the court of appeals may be summarized:

1) The appeal was "abated" after submission without notice, hearing or the issuance of an order and without authorization by statute or rule of court.

2) The case, after submission in November of 1976, was reported to the Administrative Office of the United States Courts on March 15, 1978, as terminated by remand. The case on May 11, 1981, was again reported to that office as a pending appeal.

3) The en banc court to which the case had been submitted was "terminated" without explanation four and one-half years after submission and reassigned to a panel consisting of three judges who had sat on the en banc court.

REASONS FOR GRANTING THE WRIT

While these consolidated cases have had a tortuous 19 years of litigation, they are not overly complicated. Notwithstanding, inordinate delays have occurred; questionable procedures have been improvised; long-standing principles of law ignored or misapplied; and judicial objectivity has been discarded. We respectfully submit that this case should be reviewed by this Court so that settled principles of law may be applied to the facts as were established in the trial court, and proper procedures may be determined for appeals in the circuits. Not only will the ends of justice be served but hopefully some finality may be forthcoming for this protracted litigation.

The cases tried in the district of Kansas in 1968 and again in 1974 were comprehensively prepared and presented. All the parties were present. Both trials took many weeks, after which all parties presented extensive findings of fact, conclusions of law and briefs for the court's study and consideration. In both instances, the trial court wrote extensive opinions discussing the evidence and theories of the parties which opinions reveal a thorough and careful consideration of the evidence and applicable law.

On the other hand, in the case presented to the district court in Oklahoma in 1973, less than one-half of one percent of the conservation helium was involved, three of the four Helex Companies were not parties, only one of the 500 producers was a party and none of the 30,000 landowners were parties. Nevertheless, the court of appeals has used those abbreviated proceedings as its guideline in fashioning rules and remedies and at the same time disregarding the much better presented and far more comprehensive pro-

ceedings in Kansas. As a result, we submit the court has violated basic principles of fairness embodied in the due process clause of the Fifth Amendment and such rulings by the court of appeals, singularly or in combination, constitute such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

1. The Court of Appeals for the Tenth Circuit Has Denied Petitioners Due Process.

a) Applying the Law of the Case of Another Decision. The Law-of-the-Case Doctrine should not be applied to different parties, involving different gas streams, different extraction plants and different kinds of evidence. *Champlin Refining Co. v. Commissioner of Internal Rev.*, 123 F.2d 202 (10th Cir. 1941). Fundamentally, the Helex Companies were entitled to their day in court. Judge Doyle in his dissent in *Ashland* recognized that the Kansas proceedings were far more comprehensive and the record superior. (554 F.2d 381, 397) (Appendix p. A466)

While the court of appeals in writing its opinion in *Ashland* stated it was not considering the Helex cases, when the decision of these cases was finally announced, we learned for the first time that (1) the work-back method of determining helium values became the law of the case and it must be used to the exclusion of all other evidence; and (2) the court in *Ashland* had concluded that further Oklahoma proceedings would resolve the valuation issue in the Helex cases (666 F.2d 1279, 1281) (Appendix p. A4), even though those further proceedings on remand were narrowly limited basically to three aspects of the work-back method (starting point, liquid credits, and rate of return). Consequently, the *Ashland* trial court was thwarted from hearing comparable sales evidence or ex-

pert and interpretative opinion which the trial court in Kansas had found persuasive. The Helex Companies were left with a tribunal in Oklahoma to which they were not parties and which had been restricted with a mandate limiting the kind of evidence it could consider.

To render judgment upon a matter not within the pleadings and not in fact litigated "is contrary to fundamental principles of justice." *Coe v. Armour Fertilizer Works,* 237 U.S. 413 (1915), and cf. *Reynolds v. Stockton* 140 U.S. 254 (1891).

b) Abating Case Without Notice or Hearing. On May 11, 1981, four and one-half years after submission, the petitioners learned for the first time that the appeal had been in an "abated" status. There is nothing in the clerk's docket sheets which reflect the entering of any such order. Petitioners have since learned that these appeals were reported to the Judicial Administrator of the United States Courts on March 15, 1978 as having been terminated by remand to the district court. The Administrator's records reveal that the cases reappeared on his dockets as of May 11, 1981. However, petitioners had not been informed that their case was abated awaiting a factual determination by another court.

Petitioners at a minimum were entitled to notice of any order of abatement and an opportunity for a hearing thereon. Had they known of such status, they could have sought intervention in the *Ashland* case before it was retried or they could have sought relief from this Court by writ of certiorari or other relief available under the extraordinary writs act (28 U.S.C. 1651(a), Supreme Court Rule 26). Certainly such innovative procedure which is not provided for in the statutes or rules should be examined by this Court to determine if it complies with

fundamental notions of due process or is otherwise consistent with the orderly administration of the court of appeals.

c) Terminating an En Banc Court After Submission.

The "terminating" of an en banc court years after submission is to our knowledge unprecedented. We believe the procedure is abhorrent to our judicial system. Inherent in such procedure is a license for judicial mischief inconsistent with notions of fair play mandated by the due process clause.

In *Ashland* Judge Doyle of the en banc court vigorously dissented about the use of the work-back methodology, particularly if it were to be applied to the much larger Helex cases. His prescience was well founded, as it turned out, but we do not have the benefit of his views in this case since it appears he was a casualty of the "termination" of the en banc court.

The en banc power has received the imprimatur of the Supreme Court as "a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where it might be appropriate." *Western Pacific Railroad Corporation v. Western Pacific Railroad Co.*, 345 U.S. 247, 260 (1953). Obviously, the court at one time felt en banc procedures appropriate. The en banc court in *Ashland* stated that *Grounds* "is not considered in this opinion." Since subsequently the court ruled that the appeal was determined by the law of the case in *Ashland* on its face this appeal was never considered by any court.

No reasons were cited for "terminating" the en banc court. Certainly any procedure which eliminates consideration by a full court once it has been convened is

deserving of an explanation and any such procedure which may eliminate diverse opinions or dissenting opinions should be closely scrutinized by this Court. Clearly dissenting opinions serve a valuable purpose for this Court in its overall responsibility for judicial supervision of inferior courts. See dissenting opinion *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1026 (2nd Cir. 1973) and "En banc Procedures in the U.S. Court of Appeals" 43 Fordham Law Review, pages 401, 421.

d) Discriminatory and Inconsistent Rulings.

The en banc court in *Ashland* had concluded that the crude helium contracts between Phillips and the United States did not establish a value for crude helium. Therefore, refined helium values were appropriate as the starting point for the work-back method with resulting values of contained helium in the gas stream exceeding values paid by the United States for crude helium. (554 F.2d 381, 389) (Appendix p. A436)

On remand, the trial court concluded "If one fact has clearly emerged at retrial, it is the inappropriateness of using refined helium prices as a starting value . . ." (463 F.Supp. 619, 621) (Appendix p. A394) "Phillips' contract price of approximately $10.30 per Mcf represented a fundamentally fair and reasonable price for crude helium." (*Id.* p. 624) (Appendix p. A400) On appeal the tenth circuit affirmed the use of the contract price as a starting point. Nevertheless, in this appeal the court held that on remand "We do not here determine the proper starting point for such work-back valuation." (666 F.2d 1279, 1285) (Appendix p. A14)

Even though the court of appeals' earlier pronouncement was established as factually unsound on retrial and

such finding was affirmed on appeal, the court has ruled this finding is not binding on retrial of these much larger cases. The court of appeals has held the Helex Companies bound by the law of the case established in *Ashland* but not such rulings which go to establish realistic values. Moreover, the court has ruled that work-back must be used exclusively in these cases even in face of the experience of the Oklahoma trial court which on retrial found the exclusive use of work-back as inappropriate. This we submit is discrimination and demonstrates less than objective treatment of these cases.

e) Third-Party Beneficiary Contract Without Consideration by the Trial Court.

While the court of appeals recognized that the "District Court did not directly address the legal significance of the $2.00 per m.c.f. payment by the United States to the Helex Companies" (666 F.2d 1279, 1287) (Appendix p. A18) it "was, as between the United States and the Helex Group, understood to be the floor, the minimum to which the lessee-producers and landowners were entitled. Thus, we hold that it is money had and received by the Helex Companies for the use and benefit of the landowners and lessee-producers as a minimum of their entitlement." (666 F.2d 1279, 1287) (Appendix p. A18)

The tenth circuit has held that the right of a third party to sue on a contract made for his benefit "requires that the right be apparent from the express provisions of the contract and that the benefit cannot be incidental 'but must be a direct benefit intended by the contracting parties to accrue in favor of the third party' ". *Gallagher v. Continental Ins. Co.*, 502 F.2d 827, 833 (10th Cir. 1974). Kansas has held "Since contracting parties are presumed to act for themselves, an intent to benefit a third person should

be clearly expressed in the contract." *Ronnau v. Caravan International Corp.*, 205 Kan. 154, 159, 468 P.2d 118, 122 (1970).

The issue of third-party beneficiary and intent of the parties was not considered by the trial court, was not in the issues or pleadings, and no evidence was produced thereon by the parties.

The result is to open up a parcel of other issues. For example, in the government build-up of projected costs an allowance of 6 1/2 percent rate of return on a projected investment was included. If petitioners must pay $2.00 or more plus prejudgment interest to third parties, they will not realize such return. If the result is confiscation of its property, should not this be a defense as a taking of its property without due process? If such return is not realized, do petitioners have a further claim against the government?

Aside from these additional issues, the result of such ruling is the imposition of a liability to the Helex Companies in excess of $40,000,000.00. Surely the parties should be entitled to have such issue litigated before the trial court with an opportunity to produce evidence thereon.

2. Work-Back As Exclusive Means of Determining Value.

The novel theory of work-back, first presented in the *Ashland* case, was thoroughly litigated in the trial of these interpleader cases. As presented, the trial court rejected it as being unrealistic and in effect requiring the regulation of the private helium industry. Even in the retrial of the *Ashland* case while operating under a restrictive mandate, the trial court found strict adherence to work-back as inequitable and unworkable. In his dissent in *Ashland*,

Judge Doyle noted that evidence of actual sales provided a:

> ". . . more rational and realistic view of value than does some theoretical approach such as the work-back . . . (554 F.2d 381, 396) (Appendix p. A464)
>
> . . .
>
> this is exactly what Judge Brown did in the *Helex Cases*, and his result is realistic and reliable." (*Id.*, 395) (Appendix p. A462)

The court of appeals for the tenth circuit in *United States v. Sowards*, 370 F.2d 87 (10th Cir. 1966), held that in determining value the law of evidence in federal courts favors a broad rule of admissibility which permits the admission of all evidence which is relevant and material to the issues unless there is a sound reason for excluding it. Notwithstanding the rule, the court of appeals has here embraced work-back exclusively as a result of the abbreviated proceedings in the district court in Oklahoma. Judge Doyle had stated persuasively that while comparable sales need not be accepted as gospel they could at least be viewed without fear of being contaminated. As the opinion of the trial court below demonstrates, the court heard and considered many examples of relevant evidence in an effort to follow the broad rule of admissibility set out in *Sowards*, supra. The court of appeals has now ruled that the rule should be just the opposite, i.e. narrow and restrictive.

We submit that the determination of value is much too important an issue in the federal courts so as to let stand such a restrictive precedent. As the evidence revealed in the trial, work-back is not a means of determining value but rather a means of dividing proceeds. Moreover, as applied here, it is punitive. The more efficiencies and

savings the Helex extractors made the higher the value they must pay.

Exclusive reliance upon work-back as here directed by the court of appeals is such a radical departure from the broad rule of admissibility followed in the federal courts that we submit it requires examination by this Court because of its likely effect on so many cases involving the determination of value.

3. The Court of Appeals Has Greatly Broadened the Application of Federal Common Law Concept, and in Doing So Misconstrued the Clearfield Doctrine.

The interest of the United States in this controversy comes about solely because of its potential liability under the indemnity clause of the crude helium contract. This clause simply provides that if the Helex Companies should have to pay claims for the helium to third parties (excluding affiliated companies) the United States would indemnify them for payments exceeding approximately $3.00 per Mcf. The record is clear as to why and how this provision was negotiated into the contract. Since helium is a non-hydrocarbon, two of the Helex Companies who first contracted with the United States anticipated claims would be asserted that such element was not included in the usual oil and gas lease and therefore not conveyed in the gas purchase contracts with the pipeline. While both the Helex Companies and the United States believed that they had good title to the helium, there was no authoritative court decision on the question. The first two contractors Northern Helex and Cities Service Helex negotiated with the government for this indemnity provision. It was included by the United States in the other two contracts simply to be consistent.

In view of this clause, the contention was made that it was a price escalation clause for benefit of third parties. Both the trial courts in Kansas and Oklahoma found this contention factually incorrect. Notwithstanding these findings, the court of appeals has ruled that the United States took possession of the helium before title questions were resolved and that it was in fact the "real party in interest". Therefore, the court reasoned that apart from giving the federal court jurisdiction (struck down in *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974)) a federal common law could be fashioned in order to justify assessment of prejudgment interest against the Helex Companies and the United States.

This constitutes a serious departure from this Court's recent admonishment in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, ... U.S. ....., 68 L.Ed.2d 500, 101 S.Ct. 2061 (1981), where the court noted that there is no general federal common law except in some limited cases in which a federal rule of decision is "necessary to protect uniquely federal interests" or Congress has given the courts power to act.

The ruling by the tenth circuit invites the federal courts to improvise new doctrines and rules whenever it appears the United States might have some interest in litigation. It, in effect, nullifies *Erie Railroad Co. v. Tompkins*, if the United States is a party or somehow is involved. The consequences of such a doctrine is so far-reaching that it would create chaos with any contracts or transactions with the United States by the discarding of settled state law precepts.

The *Clearfield* doctrine alluded to by the court of appeals was devised to protect some special interest of the United States government in circumstances where the

overall good to the public outweighed the strict application of settled state law. Here, however, the court has used the doctrine to impose a liability of prejudgment interest first on the private Helex Companies, and then, provided it exceeds the indemnity threshold, upon the United States. The doctrine originally implemented as a shield has now become a sword against both private parties and the United States. cf. *Miree v. DeKalb County*, 433 U.S. 25 (1977).

Because of the numerous contracts entered into between private parties and the United States we believe it is imperative that this holding be examined lest inferior courts fashion a new federal common law on a contract-by-contract basis.

4. The "Void" Into Which the Producers of Helium Bearing Gas Fall Because of the Interaction Between the Natural Gas Act and Section 11 of the Helium Act Amendments Can Be Filled Without Abrogating the Gas Purchase Contracts.

Henry Wheeler, the chief negotiator for the government, testified that the purpose of Section 11 of the Helium Act Amendments was to prevent taking profits of the pipeline companies and their affiliate extracting companies and using them to reduce their wholesale natural gas rates. (Appendix p. A674) Notwithstanding, if Section 11 prevents the FPC from regulating the price for helium in the gas purchase contracts, the Natural Gas Act and Section 11 can still be reconciled without destroying the Gas Purchase Contracts.

In those instances where the FPC rate was less than the contract rate, value for the helium constituent could be resolved by simply compelling the Helex Companies to pay the difference between the FPC rate and the contract rate for the volumetric amount of the helium constit-

uent (approximately .43% of the total gas stream). An exhibit showing such calculations was admitted in the trial below.

If this were required, payment under the FPC rates would not constitute a defense for the payment of helium within the rationale of *Phillips Petroleum Company v. Texaco, Inc.*, 415 U.S. 125 (1974), and also would harmonize with the rationale of not allowing a regulated utility rate applying to helium. In addition, it would give full force and effect to the gas purchase and sales contracts between the parties which include the helium constituent as well as the other constituents in the gas stream. As it stands, under the ruling of the court of appeals, private contracts are abrogated raising serious due process questions under the Fifth Amendment. This reasoning also squares with value being a matter of quantum meruit allowed under state law. cf. *Falls Sand and Gravel Co. v. Western Concrete, Inc.*, 270 F.Supp. 495 (D.C. Mont. 1967), applying Montana law:

> "'. . . In such case the effect of proof of the express contract is to make the stipulated compensation the quantum meruit in the case.' . . . The only effect in such a case of proof of an express contract fixing the price, is that the stipulated price becomes the quantum meruit in the case."

Not only is the value of helium in the conservation program involved in these proceedings but also affected is a substantial private helium industry with similar issues. Several cases pertaining to the extraction of helium in the private sector remain pending in both state and federal courts. These proceedings and these issues now definitely require a review by this Court with its concomitant settling influence upon a myriad of cases as well as upon an entire industry.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 81-1922

In the Supreme Court of the United States

October Term, 1981

CITIES SERVICE GAS COMPANY,
CITIES SERVICE CRYOGENICS, INC.,
CITIES SERVICE HELEX,
Petitioners,

vs.

MOBIL OIL CORPORATION, et al.,

and

RALPH GROUNDS, et al.,
Respondents,

vs.

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS IN RESPONSE TO BRIEFS IN OPPOSITION AND MEMORANDUM FOR THE UNITED STATES

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REPLY BRIEF OF PETITIONERS CITIES SERVICE GAS COMPANY, CITIES SERVICE CRYOGENICS, INC. AND CITIES SERVICE HELEX IN RESPONSE TO BRIEFS IN OPPOSITION AND MEMORANDUM FOR THE UNITED STATES

STATEMENT

Certain statements and arguments made in the several briefs in opposition may lead to confusion and we believe a brief clarification may be helpful to the Court. However,

most of the confusion generated in this case can be dispelled by a reading of the Kansas trial court's exhaustive and carefully written opinions, both of which were written after months and weeks of hearing testimony, examining thousands of documents and poring over reams of briefs submitted by the various parties. (J.A. A170, A28)

ARGUMENT

Brief of Mobil, et al.

A statement is made by Mobil that the court of appeals in *Grounds I* held that title failed for failure to pay for the helium. While there is a statement to that effect, there is also a statement in that case that legal title to the helium constituent in the gas stream passed to the purchasers under the gas sales contracts. The Court should not be deceived into believing that the helium constituent was not paid for under the gas purchase contracts. The helium constituent in the gas stream turned the meters the same as the other gas constituents and it was all paid for under the gas purchase contracts at the price agreed upon by the parties in arm-length negotiations. Admittedly there were instances in which the full contract rate could not be paid because of FPC regulation under the Natural Gas Act, 15 U.S.C. 717, et seq. But, there were hundreds of instances where the full contract price was the same as or less than the FPC allowed rate and the sellers received every penny they bargained for. In those instances where the rate was less than the contract price, petitioners owe the difference between the rate paid and the contract price for the 0.43% of the helium constituent. But, there exists no reason why the contract price for all of the constituents should not control because this is precisely what the parties agreed to. As

Judge Brown in the initial trial pointed out, the parties were free to negotiate a separate price for the helium constituent and nothing in the Helium Act Amendments of 1960, 50 U.S.C. 167, et seq. prevented the parties from doing exactly that. In fact, this is precisely what Kansas-Nebraska did in approximately 25 contracts it negotiated along in 1963 to 1965 when it contemplated the construction of a helium extraction facility. (J.A. A85)

The Kansas trial court did find there were comparable sales for helium notwithstanding the statement in Mobil's brief to the contrary. A reading of the trial court's opinion will clearly demonstrate this. (J.A. A28) As to the statement that the Helex Group and the government considered the value of helium to be at least $2.00 which was proved by the lessee-producer group, such contention was not even advanced to the trial court and obviously since that court's finding of value was between $.60 and $.70, a minimum value of $2.00 was not proved.

Brief of Amoco, et al.

Again, these parties tend to confuse the issues by making reference to facts about the minimum value of helium which were presented and argued at length before the trial court but which were not accepted by the trier of the fact. The gratuitous statement in the conclusion of this brief that the petitioning helium extractors continue to profit by millions of dollars each year is the precise kind of fact that the trial court found unbelievable although the trial court looked at our profits carefully. (J.A. A54)

Brief of Gulf Oil Corporation

Even more confusion is injected into this case by the statement by this lessee-producer "that these are quasi-contractual actions governed by federal law - and that under federal law restitution must be made of benefits received in excess of lawful service rates." (P. 7) This, of course, constitutes an admission that the holding of the court of appeals is directly contrary to *Phillips Petroleum v. Texaco, Inc.*, 415 U.S. 124 (1974). But Gulf asserts that because federal law is applicable petitioners are not even entitled to a hearing before the trial court on the factual issue of third-party beneficiary. (P. 12) The lessee-producer group obviously cannot agree on what theory the court of appeals has decided upon and for this reason alone the decision should be reviewed by this Court in order to clarify the legal principles so that inferior courts are not misled by the unclear rulings of the court of appeals.

Brief of Landowners

The landowners argue that the intent in the helex contracts to benefit third parties is so clear no extraneous evidence is needed in view of the plain contractual language. (P. 8) They argue that the $2.00 per mcf benefit is so clear that it should in fact be $3.00 per mcf. But what those respondents are attempting to argue is that the indemnification clause of the contracts (7.5 in the National Helium contract, J.A. A626) is a price escalation provision rather than an indemnity provision. This contention has been thoroughly examined by both the Kansas trial court and the Oklahoma trial court and found to be factually unsound. (J.A. A100 and A400-401) In fact the court of appeals at one time endorsed this theory. (J.A. A436, but see Judge Doyle's Dissent A457) But on

retrial the Oklahoma trial court found that the price the government and Phillips negotiated was both fair and final and no one expected that the government would pay more than the actual price therein stipulated.

Nor should the Court be deceived about statements about a government monopoly over helium. The government never had a monopoly over helium as such. For many years the government was the only entity dealing with helium because its demand was so limited. After the demand increased, private industry became active and remains so to this day.

Memorandum for the United States

The United States which has been allied with the helex petitioners, has filed a response in which it states it does not oppose the Helex Group Petitions for Certiorari. While agreeing with the points raised by the Helex Group, it nevertheless questions whether two points raised in such petitions are worthy of certiorari. Initially, while agreeing that the lower court's third-party beneficiary determination in the contract with the Helex Group was probable error, it questions whether such error states any novel proposition of contract law or misconstrues a rule of law having widespread significance. Aside from the fact that the third-party beneficiary rule has never before been so applied, the real novelty is that a United States court would violate judicial procedures and principles involving fundamental notions of notice and fair play basic to and inherent in our judicial system. If the question of third-party beneficiary were not before the trial court, the helex petitioners obviously had no notice nor an opportunity to produce evidence on a question which results *ipso facto* in a minimum judgment against helex petitioners in excess of $40,000,000.00. It is dis-

concerting that the United States is unconcerned about a violation involving basic constitutional principles of due process. It should forcibly resist, where possible, any attempt to undercut constitutional principles whether they be committed by some municipal magistrate or by a United States court.

Secondly, we suggest that the position of the United States on the court of appeals' application of federal common law is not only incorrect but can also result in potential losses of hundreds of millions of dollars to the United States and its taxpayers.

The court of appeals in *Ashland* justified the application of federal common law by stating that there existed "claims made by a multitude of interests owners from many states relating to production from Kansas, Oklahoma and Texas." (J.A. A450) The fact is in that case there was only one claimant, Ashland, and its claims involved only 18 wells, all located in Texas.

The court of appeals did not apply federal common law in assessment of prejudgment interest in order to have uniformity among several state laws. There was no showing that the laws of the several states were different on this point. The court simply held that since the United States had entered into contracts to purchase this one commodity and it obtained possession before title questions were resolved, the petitioners and the United States must pay prejudgment interest *notwithstanding any state law to the contrary.*

Thirdly, we point out that the United States purchases thousands of commodities including food, grain and lumber grown and processed in many different states. Obviously the federal courts do not establish a new body of federal common law involving each of these acquisitions.

There is nothing in the acquisition of helium that should require any different treatment. Clearly, there is nothing in the Helium Act Amendments, 50 U.S.C. 167, et seq. that require imposition of federal common law.

Finally, we suggest that if the potential liability of the United States is so great as its brief suggests as to justify the imposition of federal common law then surely it is sufficient to justify review by this Court.

CONCLUSION

It is noteworthy that none of the respondents addressed the issue raised by petitioners that the use of work-back as the exclusive means of determining value is too narrow and restrictive as a rule for determining value in the federal courts. Surely such issue cannot be frivolous inasmuch as Judge Doyle vigorously dissented on this point in *Ashland I.* (J.A. A456) For this reason and other reasons stated above, the respondents have failed to demonstrate any sound reasons why this case should not be reviewed and, therefore, the Petitions should be granted.

Respectfully submitted,

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May, 1982